In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-225

PATROCINIA L. VDA DE RODULFA AND JULIANA CAPARAS VDA DEL ROSARIO, PETITIONERS

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are the widows of Philippine Scouts who died while in military service in World War II. Each was initially awarded monthly death compensation benefits pursuant to 38 U.S.C. 321. The Veterans Administrator subsequently terminated the awards on the basis of his determination that petitioners were no longer eligible to receive benefits (Pet. App. 4a-6a).

At the time of the Veterans Administrator's determination, 38 U.S.C. (1964 ed.) 211(a) provided that:

> Except as provided in Sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.[1]

On the basis of the holding in *Tracy* v. *Gleason*, 379 F.2d 469 (C.A.D.C.), that Section 211(a) did not preclude judicial review of *terminations* of previous awards of non-contractual veterans' benefits, petitioners instituted these suits. The district court ruled that the termination of petitioners' benefits had been improper and entered judgments for petitioners. At the same time, the court also directed the payment of attorneys' fees to petitioners' counsel out of the monies to which petitioners became entitled as a result of the judgments.

The Administrator appealed the award of counsel fees, citing the express provision in 38 U.S.C. 3405, which prohibits the receipt, "directly or indirectly," of "any fee or compensation except as provided in Sections 3404 or 784 of" Title 38, United States Code.[2]

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[1] The statutory exceptions to the finality rule of Section 211(a) relate to contractual veterans' benefits (National Life Insurance, Section 784) and loan guaranties (Ch. 37 of Title 38).

[2] Section 3404 authorizes fees in proceedings before the Administrator. Section 784 governs suits based upon National

The Administrator pointed to the fact that there was no provision authorizing counsel fees in suits to obtain compensation benefits, and accordingly contended that the award of such fees by the district court was improper.

During the pendency of the appeal, Congress amended Section 211(a) to provide:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. [Pub. L. 91-376, Section 8(a), August 12, 1970, 84 Stat. 790.]

As set forth in detail in the opinion of the court of appeals, the legislative history of this amendment indicates that its purpose was to overrule *Tracy* v. *Gleason*, *supra*, thus precluding judicial review of all determinations of the Administrator pertaining to non-contractual benefits (Pet. App. 13a-18a). The provision in the amendment retroactively according finality to decisions of the Administrator made on or before October 17, 1940, divested the federal courts of jurisdiction in all pending cases, as well as those

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Service Life Insurance contracts, and expressly provides a percentage fee for successful counsel.

arising subsequent to the date of enactment (Pet. App. 17a-18a).

Without reaching the Administrator's alternative contention that the fee awards were barred under 38 U.S.C. 3405, the court of appeals held that the amended Section 211(a) withdrew the district court's jurisdiction to grant death compensation benefits, and, *a fortiori*, also deprived the court of power to award counsel fees based upon those benefits (Pet. App. 34a). The court accordingly vacated the district court's award of counsel fees.

2. Since the decision of the court of appeals is correct, and the issues raised by petitioners with respect to Section 211(a) will not recur, further review by this Court is not warranted.

The opinion of the court of appeals, on which we rely, thoroughly considers the language and legislative history of the amendment to Section 211(a) and correctly concludes that Congress intended to reach pending cases as well as suits brought in the future (Pet. App. 12a-18a).[3] And in holding that Section 211(a), as amended, deprived it of jurisdiction in this appeal, the court below properly applied the

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[3] Petitioners argue that Section 211(a), as amended, is inapplicable here because this case involves decisions of the district court (restoring forfeited benefits) rather than "decisions of the Administrator," as the statute provides (Pet. 8-11). But as the court of appeals recognized, with respect to this case the decisions referred to in the statute are the Administrator's original decisions in 1954 and 1955 terminating benefits—decisions petitioners sought to have set aside when they filed these actions.

principle that a supervening statutory amendment divesting the court of jurisdiction of the underlying claim necessarily also deprives the court of power to render a judgment—such as a fee award—predicated upon that claim. *Smallwood* v. *Gallardo*, 275 U.S. 56.[4]

Petitioners argue that if this interpretation of the amendment to Section 211(a) is correct their counsel have been deprived of vested interests in their fee judgments in violation of the Fifth Amendment (Pet. 11-17). But as the court of appeals correctly held, "Section 211(a) left unimpaired any litigable claim of counsel against their clients" (Pet. App. 32a) and, with respect to the government, there can be no contention that obligations under a preexisting contract have been impaired since counsel had no such contract with the government (Pet. App. 31a).[5]

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[4] This principle applies not only to cases pending in the trial court but also to cases, such as this, pending on appeal. *Smallwood* v. *Gallardo, supra*, 275 U.S. at 62; *United States* v. *Schooner Peggy*, 1 Cranch 103; and cases cited in the opinion below, Pet. App. 19a, n. 50.

[5] Quite apart from the effect of the 1970 amendment on Section 211(a), we believe that under the legislative scheme applicable to veterans' benefits, counsel fees may not be awarded in connection with suits to review claims for compensation benefits. See 38 U.S.C. 784(g), 3404(c) and 3405.

In any event, since it is undisputed that the amendment to Section 211(a) precludes judicial review of claims for non-contractual benefits, the propriety of counsel fees awarded—as here—in suits to review such claims cannot arise again.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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